

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1319

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- x
UNITED STATES OF AMERICA, :
Appellee, :
-against- :
NANCY REED, :
Appellant. :
----- x

To be argued by
Richard A. Greenberg

Docket No. 77-1319

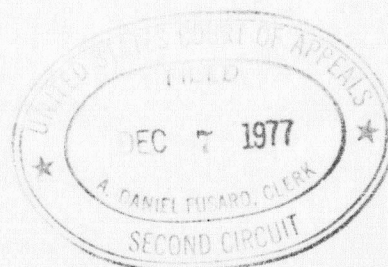
REPLY BRIEF FOR APPELLANT NANCY REED

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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ARGUMENT

POINT I

APPELLANT REED DID NOT WAIVE HER MOTION TO SUPPRESS EVIDENCE SEIZED PURSUANT TO HER WARRANTLESS ARREST (answering Point I-A, pp. 12-13, of the government's brief)

Although recognizing that the trial court "considered Reed's motion [] on the merits [] in the middle of the trial" (govt. br., p. 13), the government contends for the first time on this appeal that the court "need not have done so" because appellant Reed "failed to preserve this issue prior to trial, pursuant to Rule 12 (f), F.R.Cr.P." At trial, however, the government made no such contention, and should not now be heard to complain of an issue which it did not deem important enough to even mention below. For, as the government itself has acknowledged on this appeal (govt. br., p. 13, fn.), this Court is generally unwilling "to entertain arguments on appeal which defendants [] or the government [] have not specifically presented to the trial court."

Moreover, even if the government had made this argument below, the trial court undoubtedly would have rejected it, given Judge Bryant's "distress" over the government's failure to turn over the telephone books to defense counsel prior to trial, and his admonition to the prosecutor not to "try and withhold anything and be a little smart about it" (Tr. 281-283).

The government now takes issue with Judge Bryant's criticism of the prosecutor (govt. br., p. 13, fn.), contending that, among other things, Mrs. Reed knew that the government kept copies of the telephone books when it returned the originals to her, and therefore defense counsel should not have been surprised when the government sought to introduce the telephone books at trial. In response to this precise argument by the prosecutor, Judge Bryant observed,

Look, a point like that doesn't make any sense, doesn't make any sense at all. And only illustrates in fact indicates to me even further that they [the telephone books] should have been turned over. When you are relying on something like that, that doesn't make any sense at all (Tr. 282).

Presumably, the court meant that appellant alone could not have been expected to understand the significance in the government keeping copies of her telephone books, and therefore could not have been expected to make mention of that fact to her attorney. Indeed, there is no reason to disbelieve defense counsel's assertion that he in fact was completely unaware of the existence of the telephone books before their introduction at the trial since he promptly moved to suppress them when he did learn of their existence.

The government also contends that the reciprocal discovery discussions between the prosecutor and defense counsel occurring the day before trial began, during which the prosecutor promised to turn over all Rule 16 material (but apparently did not fulfill his promise, at least as to the telephone books),

demonstrated that defense counsel was "remiss in obtaining the discovery necessary for him to make timely pre-trial motions" (govt. br. pp. 12-13). The government, however, overlooks the fact that it was only on the day before trial began that hearings were held on other motions of appellants. Thus, had the prosecutor turned over the telephone books even at that late date, no inconvenience or delay would have been incurred by simply conducting the suppression hearing at the same time as the other hearings.

Finally, the government argues that "[a]t no time did defense counsel for Reed spell out the present claim on appeal, namely, that the allegedly unconstitutional arrest required suppression of the telephone books." (govt. br., p. 13, fn.). In support of its contention that the issue on this appeal was therefore not preserved, the government cites this Court's decisions in United States v. Perez, Dkt. No. 1083, slip op. 5883, 5890 (2nd. Cir. Sept. 1977); and United States v. Braunig, 553 F. 2d 777, 780 (2d Cir. 1977), cert. den. __U.S. __, 97 S.Ct. 2686 (1977). In the first two of these cases, the issue sought to be raised on appeal had never been presented to the trial court, and in the third case the issue had been expressly abandoned in the trial court. Yet, in all three cases, this Court considered the issue on the merits notwithstanding a finding of waiver.

Here, however, far from failing to raise the issue in the trial court or abandoning it there, defense counsel raised the issue explicitly, as the following colloquy demonstrates:

MR. MARKFIELD [Reed's Counsel]: Your Honor, at this time we would want a probable cause hearing as to the basis of the arrest. There were no exigent circumstances here and he didn't have a warrant to arrest these people.

MR. MAZUR [Assistant U.S. Atty.]: I would like the Court to instruct the jury that there is no requirement of an arrest warrant.

MR. MARKFIELD: I believe, under the circumstances, there would be the requirement of an arrest warrant.

THE COURT: She came to the door and they arrested her. Then they went into the apartment. Do you take the position that they had no right to go in her apartment?

MR. MARKFIELD: Not at that time, that there were no reasons why they couldn't get an arrest warrant and search warrant. They went there to search and arrest.

THE COURT: There is no evidence of any search.

MR. MARKFIELD: They took the book.

THE COURT: The book was lying in plain view. There is no objection to picking up evidence that is lying in plain view. That's quite clear.

MS. SOLLEDER [Goldsmith's Counsel]: Your Honor, the Supreme Court has said that when there are no exigent circumstances the government should proceed with an arrest warrant. Here this was five months after the last transaction (Tr.412-413).

Moreover, in rejecting appellants' claim based on 21 U.S.C. § 878, United States v. Watson, 423 U.S. 411 (1976), and United States v. Santana, 427 U.S. 38 (1976), the trial judge demonstrated that he understood precisely what appellants were arguing below, and what appellants contend on this appeal, namely, whether the telephone books were seized pursuant to an unlawful, warrantless arrest.

In sum, the government raised no objection at trial to the Court's consideration of the issue on the merits; the Court in fact considered the issue on the merits; and therefore no reason exists for this Court to avoid reaching a decision on the merits as well.

POINT II

THIS CASE IS NOT GOVERNED BY SANTANA (answering POINT I-B, pp. 14-18 of the government's brief)

The government also contends that appellant Reed has misconstrued the record, that Reed's arrest occurred in a "public place" and not in her apartment, and that therefore this case is controlled by Santana. The government, however, is wrong on all counts.

Conspicuously absent from the government's rendition of the facts relating to the place of arrest is the actual testimony of Agent Bell, who arrested Reed. Bell testified that, while he may have told Reed that she was about to be arrested when she appeared at the door, the actual arrest in fact took place well within her apartment:

- A. When I identified ourselves as agents of the Federal Government Drug Enforcement Administration, we were admitted to the apartment. Ms. Reed opened the door, I believe, and we told her that we had -- we were arresting her and Mr. Goldsmith. Mr. Goldsmith was in the bedroom. He was in bed -- I didn't see this, I did not arrest Mr. Goldsmith.

Q. Just restrict yourself to what you saw and what you heard and what you did, okay?

A. Ms. Réed was in the living room or the dining area and with a tall female child /subsequently / identified as Ms. Reed's daughter. We explained to her who we were again. I placed Ms. Reed under arrest, and at that time I gave her her rights...(Tr.237, emphasis added).

Significantly, Mrs. Reed gave an account of her arrest that was consistent with Bell's version that the arrest took place inside:

My daughter went to the door first, and they announced themselves as being police, so I came to the door and I opened the door. They rushed in, two ran immediately to the bedroom. Bell ran into my kitchen, came out of my kitchen with the phone books which he had taken out of my drawer and then he told me -- he started reading the rights or whatever, and he told me I was under arrest, but that was all after he came into the apartment (Tr. 275, emphasis added).

Thus, the record makes clear that Reed was within her apartment when agent Bell "placed /her / under arrest."

Moreover, even if Reed was in fact arrested when she came to the door, a contention belied by both Bell's and her testimony, nevertheless, the record is equally clear that she was still within her apartment. The agents never testified that she crossed the threshold of her apartment into the hallway, or even that she was "standing in the doorway" where "one step forward would have put her outside, one step backward would have put her /inside /," as was the defendant in Santana, 427 U.S. at 40, N.1. On the contrary, since Mrs. Reed's door, like

virtually every other residence door, undoubtedly opened inward, she almost certainly would have been standing well within the apartment as she appeared at the door in response to the agents' knock.

In short, appellant has not misconstrued the record in asserting on this appeal that her arrest took place "in the living room or dining area in front of her teenage daughter" (Br.31), "in appellant Reed's apartment" (Br. 10), "within her home" (Br.21), or "while she was inside her own apartment" (Br. 21), and the government is simply mistaken in asserting otherwise*.

The government has compounded its misstatement by arguing from it that appellant's arrest can be sustained on the basis of Santana. As stated in appellant's principal brief (p.25, fn.), Mrs. Santana was arrested without a warrant in the vestibule of her house after police officers, who had probable cause to believe she had just sold narcotics only moments before, observed her standing in the street doorway of her house holding a brown paper bag, and then pursued her into the vestibule where she fled after the police accosted her from the street. The bag of course turned out to contain narcotics and Santana was found in possession of marked money. The Court's majority

*Even assuming that the trial court's off-handed remark that appellant "came to the door and they arrested her" can be considered a finding of fact, it is either not supported by the record or, if it is, it does not negate the fact that appellant was arrested inside her apartment.

upheld the arrest as a proper extension of United States v. Watson, supra. Two concurring Justices found the arrest lawful because there existed "the significant risk that the marked money would no longer be in Santana's possession" if the police had waited to obtain a warrant, and because by "ventur[ing] into plain view" Mrs. Santana had made harmless the failure to obtain a warrant. Two Justices dissented.

There are no less than three crucial distinctions between this case and Santana which make Santana totally inapplicable. First, there existed in Santana exigent circumstances while the government has conceded on this appeal that none existed here (govt's br., p.19). That the exigencies in Santana were important to even Justice Rehnquist's majority opinion, not to mention to Justices Stevens' and Stewarts' concurrence, is demonstrated by his observation that "o[nce] Santana saw the police, there was likewise a realistic expectation that any delay would result in destruction of evidence." 427 U.S. at 43.

Second, in terms of the reasonable expectations of privacy which a citizen is justified in having and which the Fourth Amendment is designed to protect, Santana, supra, 427 U.S. at 42; Katz v. United States, 389 U.S. 347, 351-352 (1967); United States v. Galante, 547 F. 2d 733, 740, N.12 (1976), the two cases cannot be compared. While Santana may have abandoned any such legitimate expectation of privacy by standing in the street doorway of her house holding a bag of contraband, thereby making her-

self "not merely visible to the public but as exposed to public view, speech, hearing and touch as if she had been standing completely outside her house" [Santana, supra, 427 U.S. at 42⁷], the same cannot be said of appellant. By appearing at her 14th floor apartment door, dressed only in a negligee at 7:45 A.M., Mrs. Reed simply cannot reasonably be considered to have exposed herself to the general public's view, speech, hearing, and touch in the same sense as did Santana, or really in any sense at all. One need not rely on property law concepts concerning the ownership of apartment building hallways in order to argue safely that the general public simply does not have, or avail itself of, free access to such hallways, at least not on the 14th floor. Thus, in appearing at her doorway at such an early hour, appellant Reed could far more easily have expected to find no one there at all, with the possible exception of an earlybird neighbor on his way to work. She was therefore certainly entitled to retain a substantial expectation of privacy where Santana was not.

Third, not only did Santana abandon any expectation of privacy by standing in her street doorway, she did so completely on her own without any inducement or action by the officers. Here, however, the DEA agents forced appellant to abandon her expectation of privacy, if at all, by knocking at her door. It is the most obvious form of boot-strapping for the government now to argue that the agents could lawfully bring Reed into their view by knocking at her door and announcing their authority, and

then claim that she had given up her expectation of privacy by having responded to the government's action.

In sum, either individually or together, these three distinctions demonstrate conclusively that Santana has no applicability to this case.

POINT III

THE FOURTH AMENDMENT PROHIBITED THE GOVERNMENT'S WARRANTLESS ARREST OF APPELLANT IN HER HOME (answering POINT I-C, pp. 19-24 of the government's brief).

The government concedes that no exigencies existed which excused its agents from securing an arrest warrant (govt. br.p.19). Nevertheless, it argues that even assuming "Reed did not put herself in a 'public place'", the Fourth Amendment did not bar her warrantless arrest.

In so arguing, the government contends that appellant has gone "far afield" in relying on Dorman v. United States, 435 F 2d 385 (D.C.Cir.1970) (en banc), since in the government's view Dorman involved only "a nighttime entry into a private dwelling upheld on the basis of exigent circumstances" (govt. br., p.22, fn). Dorman, however, was not cited by appellant for its facts but rather for its approach to the question of when a warrant is required for any home arrest. The factors which the Dorman court found relevant to a determination of the issue

were expressly adopted by this Court in United States v. Jarvis, 560 F. 2d 494 (2d Cir. 1977).*

In neither Dorman nor Jarvis was the factor of nighttime entry given predominance. Dorman offered the time of entry as only the last of seven factors to be considered, and in Jarvis it played no part at all since the entry occurred at midday.

That the time of entry should be only one of many factors in determining the validity of a warrantless entry, and possibly the least significant, is demonstrated by the tenuousness of the distinction between daytime and nighttime. Is 8:00 P.M. on a June night, with daylight savings time in effect and darkness not yet fallen, nighttime for Fourth Amendment purposes? Is 7:45 A.M. on a February morning, without daylight savings time and with darkness possibly not yet dissipated, daytime for Fourth Amendment purposes? Perhaps the A.L.I. has attempted to anticipate this problem by defining "night" for purposes of requiring a warrant as between 10 P.M. and 7 A.M. [Model Code of Pre-Arraignment Procedure, §120.6(3)(1975)]⁷, but the attempt is a dubious one.

*As indicated by the government (br.,p.20,fn), appellate counsel initially relied on this Court's language in the Jarvis slip opinion (slip op.4921,4929) which stated as a "holding" that the non-exigent, forcible daytime entry into Jarvis' home violated the Fourth Amendment. After the principal brief was filed, appellate counsel discovered that, shortly before, this Court had altered the relied upon language by substituting the language that a "serious question" under the Fourth Amendment was raised by the entry in Jarvis. This Court, however, did not alter its Dorman approach to the issue and presumably this approach is still valid in this Circuit.

Here, for example, had the arrest taken place only 45 minutes earlier, at 7:00 A.M. and not 7:45 A.M., it would have fallen within the A.L.I.'s prohibition of nighttime warrantless entries. Thus, the general issue presented here cannot and should not be avoided simply by reliance upon the time the arrest and entry were effected.*

Nor should the fact that the agents here did not break down appellant's door,** or use a ruse to gain entry, be determinative of the issue, as the government urges (govt.br.p.19). Again, in the Dorman and Jarvis analysis, the peaceableness of the entry was simply one of the factors to be considered and not a dispositive one, and rightly so. For, from the point of view of the sanctity of a person's privacy and security in his home, the proverbial "knock at the door" undoubtedly has as venerable a history of abuse, and often raises as great cause for insecurity, as does a physically forced entry.

*The government acknowledges that at least in United States v. Watson, 423 U.S. 411, 418, N.6 (1976) and Gerstein v. Pugh, 420 U.S. 103 113, N.13 (1975), the Supreme Court has left open the general question presented here and did not qualify it by any nighttime limitation (govt.br.p.22).

**It is worth noting that the common law rule was stated in terms which required a warrant for any "breaking" into a house to make an arrest. See 2 W.Hawkins, Pleas of the Crown 86 (1721). But at common law the word "breaking" was a term of art which did not denote the actual physical destruction of property or forcible entry of a home. Rather, the term expanded to include virtually any unconsented entry into a private dwelling. See R.Perkins, Criminal Law, pp.192-195 (2d.ed. 1969).

Moreover, to permit the police to knock at the door for the purpose of effecting a non-exigent, warrantless arrest poses an unwarranted and onerous dilemma for the citizen. If he opens the door, he has enabled the officer to circumvent any need for a warrant, thereby encouraging citizens not to open their doors. Yet, if the citizen refuses to open the door, he runs the risk of creating an exigency permitting the officer to force entry by breaking down the door. This unnecessary dilemma can be easily avoided by requiring the police to secure an arrest warrant in the first case when the absence of exigencies permit them time to do so.

In short, the government's attempt to limit this case to its facts by relying upon the absence of a forced nighttime entry should be unavailing. The general issue of warrantless home arrests must and should be decided.

The government has also attempted to frame the issue in terms of the "reasonableness" of the agents' conduct, arguing that "[t]he essence of the Fourth Amendment is that the actions of the law enforcement officials be reasonable and the arrest contested here undoubtedly meets that basic requirement"(govt.br.p.24).

Such an approach to the issue is misconceived, however, for the question is not whether the agents acted reasonably but whether the Fourth Amendment's warrant requirement makes their warrantless, non-exigent arrest per se unreasonable.

Had the purpose of the police conduct here been to search for or to seize appellant's property, the warrantless entry into her apartment would clearly have been per se unreasonable under

the Fourth Amendment, regardless of the time or means used to effect entry. G.M. Leasing Corp. v. United States, 429 U.S.338, 358 (1977), Camara v. Municipal Court, 387 U.S.523, 528-29(1967).*

To require a warrant for searching or seizing property in the home, and not for the seizure of the person, is an untenable distinction. In either case, police conduct infringes on the core interest protected by the Fourth Amendment, the security of the person in his home. United States v. United States District Court, 407 U.S. 297,313(1972); Silverman v. United States, 365 U.S.505,511(1960); Miller v. United States, 357 U.S.301,306-307(1958).

Indeed, there is even more reason to require the authority of a warrant for an entry to arrest than for a search since it is generally recognized that "the invasion and disruption of a man's life which stem from his arrest are ordinarily far greater than the relatively minor intrusions attending a search of his premises." Chimel v. California, 395 U.S. 752,766 (1969) (White,J.,concurring and dissenting); see also,United States v. Watson, supra,423 U.S. at 428-9 (Powell,J.,concurring).

Moreover, the nature of the warrant itself provides ample reason to include arrests as well as searches within the warrant requirement's ambit. The warrant affords as much protection against unreasonable invasions of the home in the arrest as in the search context. In either situation, the warrant procedure substitutes

*There is no question here of consent to enter, and the government does not argue otherwise.

the detached scrutiny of a neutral magistrate for the frequently hasty judgment of a law enforcement officer "engaged in the often competitive enterprise of ferreting out crime." Johnson v. United States, 333 U.S. 10, 14(1948).

Thus, whatever the police purpose, prior scrutiny of their basis for action by a magistrate has the special virtue of preventing unjustified intrusions into the home before they occur and thus protects the innocent as well as the guilty from invasions of their rights. See, United States v. Watson, supra, 423 U.S. at 428 (Powell, J., concurring); Chimel v. California, supra, 395 U.S. at 766, N.12.

The government argues that "an arrest warrant would not insure the reasonableness of entering a particular private dwelling to effect an arrest...[and therefore] issuance of an arrest warrant simply is a misconceived panacea, which while directed at the wrong harm, creates an unnecessary and burdensome impediment..." (govt.br.pp.23-24,fn).

Even conceding that a warrant requirement would not guarantee that officers would act reasonably in entering a particular home to make an arrest, nevertheless, it would help to insure that the officers at least had a reasonable basis for seeking to arrest the person whose home they enter. The fact that a warrant would not obviate all the evils that officers might commit is no reason to dispense with it completely when it clearly would protect against some.

Nor does appellant agree with the government that a warrant

requirement would encourage "officers to wait in ambush on public streets or in public hallways, where the difficulties of effecting an arrest could create danger for innocent bystanders." (govt.br.p.23). The government points to nothing to substantiate this claim, and in fact the opposite is more likely to be the case. Surely responsible law enforcement officials would, in the absence of exigent circumstances, prefer to proceed with the greater assurance of propriety gained through a Magistrate's warrant and, at the same time, minimize the dangers to the by-standers and themselves by arresting in the home where possible. Indeed, it is unseemly for the government to suggest on this appeal that its own agents would seek to subvert a warrant requirement by resort to irresponsible conduct.

Finally, while Jarvis and Berenguer, 562 F.2d 206 (2d Cir.1977), may not have actually decided the issue presented here, neither did this Court or the Supreme Court in any of the earlier cases cited by the government. At most, the government has relied on nothing more than dicta. Indeed, most of the cases relied on by the government were subsequently distinguished by this Court in Jarvis and Berenguer on the basis of exigent circumstances or consent to entry. Similarly, the fact that the A.L.I.'s Model Code of Pre-Arrest Procedure, Appendix XI, at 696 (1975), collects a number of state statutes which purportedly authorize warrantless home arrests is meaningless. The statute in this case, 21 U.S. C. §878, purports to authorize

the same thing. The question is, however, whether those statutes, or the one here, can be interpreted in a manner consistent with the Fourth Amendment and still ignore the warrant requirement. A number of state courts interpreting those statutes have concluded that they cannot. State v. Cook, 564 F. 2d 887 (Ariz. 1977); People v. Rainey, 545 P. 2d 1333 (Calif. 1976); People v. Moreno 491 P. 2d 575, 580 (Col. 1971); People v. Wolgemuth, 350 N.E. 2d 1139 (Ill. App. 1976); Commonwealth v. Forde, 329 N. E. 2d 717, 722 (Mass. 1975); but see, State v. Perez, 277 So. 2d 778, 782-783 (Fla.), cert denied, 414 U.S. 1064 (1973; People v. Eddington, 173 N. W. 2d 686 (Mich. App. 1970), aff'd., 198 N.W. 2d 297 (Mich. 1972).

POINT IV

THE ADMISSION OF THE TELEPHONE BOOKS WAS FAR FROM HARMLESS ERROR BEYOND A REASONABLE DOUBT (answering POINT I-D, pp.24-26 of the government's brief)

Predictably, the government also contends that, notwithstanding a violation of Appellant Reed's Fourth Amendment rights, the introduction of the telephone books was only harmless error.

In so arguing, the government ignores the fact that, faced with evidence the government now argues was so overwhelming the jury required almost a day and a half to arrive at its verdict, and even then could not agree on the last two counts which were supported by virtually the same evidence as the first two upon which they returned a verdict. The government further ignores the significant fact that, during its deliberations, the jury expressly asked for and received the telephone books, thereby demonstrating that they gave the books the importance the prosecutor urged them to when he referred to those books both in his initial summation and in rebuttal (Tr.594,627).

Instead, the government attempts to minimize the importance of the phone books by noting defense counsel's failure to refer to them in his summation, a fact which is more easily explainable by counsel's calculated unwillingness to emphasize their importance any further by mentioning them in summation.

The government further attempts to minimize the importance of the phone books by arguing that "the strongest adverse inference which the government gained from [them] was that Reed knew [McCray, P.T., Paul Levy, and James Crowley, the informant and known drug dealers] more intimately than she had admitted in her testimony" (govt. br.,p.25). Since appellant's defense of entrapment depended upon convincing the jury that she had no predisposition to sell drugs, the intimacy of her relationship with known drug dealers was a crucial factor in weighing her testimony. Thus, the government's attempt to dismiss this adverse inference as insignificant falls of its own weight. Indeed, if the minor importance attributed to the address books by the government on this appeal was taken at face value, one might well question why it felt compelled to introduce them at all. The prosecutor himself provided the answer at trial when, in arguing for their admission into evidence, he told the Court

Within those telephone books are telephone numbers for individuals named James Crowley, P.P. Paulie, Marlowe, and I believe that there are other names in those books of drug traffickers...

The Government's claim for relevance is based upon the presence in those books of the names of theunindicted co-conspirators in this case that I have just named...(Tr.242-243).

In view of the importance placed on the address books by the prosecutor at trial, the government should not now be heard to claim that they are unimportant.

Even if the proof of appellant Reed's guilt was far stronger than it actually was, the foregoing factors should lead

this Court to conclude that the telephone books were relied upon by the jury in reaching its verdict and cannot be deemed harmless now. The proof of guilt, however, was far from overwhelming.

Contrary to the government's assertion that "surveillance agents provided ample corroboration for Agent Hammonds' testimony_7" (govt.br.,p.25), there was no corroboration for Hammonds' account of the negotiations which led up to and culminated in the three substantial transactions. The one person who could have provided the most damning corroboration, the informant Adeliouis McCray whom Reed claimed entrapped her, was conveniently unavailable to testify at trial, despite defence urging that he be produced.*

Furthermore, the tape recorded conversations between Hammonds and Reed,** which the government now terms "devastating evidence" of alleged negotiations for the sale of greater amounts of narcotics, contain completely unintelligible patter which required Hammonds' uncorroborated commentary to decipher at trial.

*The government mentions in a footnote (govt.br.,p.25) that a second undercover agent, Rabb, testified to having previously been introduced to Reed as a person looking "to cop," as though this provided additional corroboration for Hammonds' testimony. The government fails to mention, however, that Rabb conceded that he "had no discussion whatsoever with the defendant Reed at that time or any time concerning narcotics" (Tr.28)

**The transcripts of those conversations, govt. exs.#11-14, are found at "F" to appellant's separate appendix.

Finally, the fact that Reed made admissions after her arrest that she had indeed sold the narcotics the government claimed she had is essentially irrelevant in view of her defense of entrapment in which, though admitting the sales, she swore she had been induced to do so by the government's agent.

In sum, the telephone books were damaging evidence at a closely contested trial in which the government's case depended almost entirely on one witness. The importance placed on the telephone books both by the prosecutor and the jury make clear that they were not harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967).

CONCLUSION

FOR THE ABOVE-STATED REASONS, AND FOR THOSE SET FORTH IN APPELLANT'S PRINCIPAL BRIEF, APPELLANT'S CONVICTION SHOULD BE REVERSED AND A NEW TRIAL ORDERED

Respectfully submitted,

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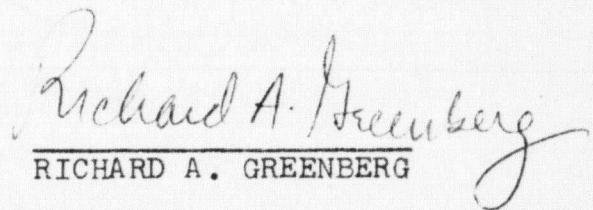
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December, 1977

CERTIFICATION OF SERVICE

I, Richard A. Greenberg, an attorney duly admitted to practice law in the State of New York and before the Court of Appeals for the Second Circuit, do hereby affirm that on December 7, 1977, I served the within Reply Brief for appellant Nancy Reed upon Honorable Robert B. Fiske, Jr., United States Attorney for the Southern District of New York and the attorney for appellee, at 1 St. Andrew's Plaza, New York, New York, the address designated by him for the purpose, by depositing a true copy of same in a postpaid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Dated: New York, New York
December 7, 1977


RICHARD A. GREENBERG